

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STEVEN K. FOX and DEPARTMENT OF THE NAVY,
NAVAL PUBLIC WORKS CENTER, Norfolk, VA

*Docket No. 00-2370; Submitted on the Record;
Issued November 28, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant was at fault in the creation of an overpayment of compensation in the amount of \$9,990.49 and therefore the overpayment was not subject to waiver; and (2) whether the Office properly required recovery of the overpayment by withholding \$300.00 a month from appellant's continuing benefits.

On January 29, 1992 appellant, then a 37-year-old carpenter, sustained a right shoulder strain, thoracic strain and a herniated disc at C6-7 while in the performance of duty. He was totally disabled from January 31, 1992 to June 15, 1994 and returned to light-duty work on June 16, 1994. Appellant had a recurrence of total disability on July 18, 1994 and January 5, 1995. He stopped work again on April 12, 1995 and did not return.

By letter dated December 10, 1996, the Office advised appellant that he would receive wage-loss benefits each four weeks at the rate of \$1,426.84, commencing on November 20, 1996.

By letter dated June 10, 1998 to the Office, the employing establishment advised that, due to a reduction in force, appellant would receive severance pay in the amount of \$15,009.12 at the rate of \$595.60 per week for 26 weeks, commencing on June 6, 1998. In the letter, the employing establishment asked the Office to "suspend payment of compensation for the period of severance pay entitlement." A copy of the letter was sent to appellant.

In Office Form EN-1032 dated April 15, 1999 (report of income for the previous 15 months), appellant noted that he had received severance pay from the employing establishment in the amount of \$15,337.89 from June to November 1998 due to a reduction in force.

On August 10, 1999 the Office calculated that appellant had received an overpayment of \$9,990.49 from June 6 to December 4, 1998 because he received both compensation and severance pay during that period.

By letter decision dated August 19, 1999, the Office found that an overpayment had occurred in the amount of \$9,990.49 because appellant had received both compensation and severance pay from June 6 to December 4, 1998.

On September 7, 1999 appellant requested a hearing that was held on March 29, 2000.

Subsequent to the hearing appellant submitted a completed overpayment questionnaire dated April 10, 2000. He provided information demonstrating a monthly income of \$1,501.79 and monthly expenses of \$1,394.14, leaving a monthly surplus of \$107.00. Appellant had \$4,730.02 in cash and bank accounts.

By decision dated April 28, 2000, the Office hearing representative found that an overpayment had been created in the amount of \$9,990.49, that appellant was at fault in the creation of the overpayment, and that the overpayment amount would be recovered by withholding \$300.00 a month from appellant's continuing compensation.

The Board finds that the Office properly determined that appellant was at fault in the creation of an overpayment of \$9,990.49, and that, therefore, the overpayment was not subject to waiver.¹

Section 8129(a) of the Federal Employees' Compensation Act² provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled.³ The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."⁴

Under section 10.433 of Title 20 of the Code of Federal Regulations, the Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.⁵ Each recipient of compensation benefits is responsible

¹ The Board notes that, on appeal, appellant does not dispute the fact of overpayment or the amount of the overpayment.

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8129(a).

⁴ 5 U.S.C. § 8129(b).

⁵ 20 C.F.R. § 10.433 (1999).

for taking all reasonable measures to ensure that payments he or she receives from the Office are proper.⁶ In determining whether an individual is at fault, section 10.433 provides in relevant part:

“A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or
- (3) Accepted a payment which he or she knew or should have known to be incorrect.”⁷

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment. On December 10, 1996 the Office advised appellant that he would receive net compensation in the amount of \$1,426.84 each four weeks commencing on November 20, 1996. By letter dated June 10, 1998, the employing establishment advised appellant and the Office that appellant would receive severance pay and asked the Office to suspend his compensation payments for 26 weeks. The employing establishment’s June 10, 1998 letter put appellant on notice of the fact that he could not accept compensation from the Office during the same period that he received severance pay from the employing establishment. The Board finds that the facts of this case establish that appellant knew or should have known that he was not entitled to receive compensation from the Office during the 26 weeks from June to December 1998 that he received severance pay from the employing establishment. Therefore he was at fault in the creation of the overpayment and the overpayment was not subject to waiver.

The Board further finds that the Office properly required repayment of the overpayment by deducting \$300.00 from appellant’s compensation payments each four weeks.

Section 10.441 of Title 20 of the Code of Federal Regulations provides in pertinent part:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to [the Office] the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, [the Office] shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.”⁸

⁶ *Id.*

⁷ 20 C.F.R. § 10.320(b).

⁸ 20 C.F.R. § 10.441 (1999).

In requiring repayment of the overpayment by deducting \$300.00 from appellant's compensation every four weeks, the Office took into consideration the financial information submitted by appellant as well as the factors set forth in section 10.441 and found that this method of recovery would minimize any hardship on appellant. Therefore, the Office properly required repayment of the overpayment by deducting \$300.00 from appellant's compensation every four weeks.

The April 28, 2000 and August 19, 1999 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
November 28, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member